

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.
--

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H027352

Plaintiff and Respondent,

(Monterey County
Superior Court
No. SS031879)

v.

TERRY ALLEN BRALEY,

Defendant and Appellant.

_____ /

Pursuant to a plea bargain agreement, defendant Terry Allen Braley pleaded no contest to unlawful possession of a firearm by a misdemeanor (Pen. Code, § 12021, subd. (c))¹ and to battery on a spouse, a misdemeanor (§ 243, subd. (e)). After defendant's motion to withdraw his plea was denied, the trial court suspended the imposition of sentence and placed defendant on three years of probation upon condition that he serve 90 days in the county jail. On appeal defendant challenges three of the probation conditions imposed by the trial court. He contends those conditions must be modified to provide that he is precluded only from *knowingly* possessing, receiving, or transporting a firearm; *knowingly* associating with people who use or traffic in controlled substances; or *knowingly* using or possessing alcohol,

¹ Further statutory references are to the Penal Code unless otherwise indicated.

drugs, or other controlled substances without a physician's prescription. Defendant did not object below to the imposition of these probation conditions. The Attorney General argues defendant is therefore precluded from challenging these conditions on appeal. Defendant claims his appellate challenges to these conditions are permissible because the waiver rule does not apply to constitutionally-based challenges to probation conditions; alternatively, he claims his trial counsel was prejudicially deficient for failing to object to facially unconstitutional probation conditions. For the reasons stated below, we shall modify each of the challenged conditions to include a knowledge requirement.

I. Facts

A. The Underlying Offenses

In the course of investigating a report of domestic violence, Monterey County Sheriff's Deputy Robert Shapiro was dispatched to 19630 Pesante Road in Salinas. On the way to that address, he found a woman walking along the roadway. "[V]isibly upset," she told Shapiro that defendant had "started to throw her property outside" when she asked him to sign divorce papers and that he had grabbed the telephone and pushed her on her chest several times when she threatened to call the police. After the woman indicated that a firearm was located in a shed at 19630 Pesante Road, Shapiro asked one of his colleagues to recover the weapon. The woman unlocked the shed and permitted Sergeant Teeter to enter. Inside the shed, Teeter recovered a .22 caliber derringer and a container that had ammunition for the weapon. The woman said the derringer and ammunition belonged to defendant.

B. The Challenged Conditions of Probation

At the sentencing hearing in this case, the trial court informed defendant that, as a condition of his probation, he was not to (1) "use or possess alcohol, narcotics, drugs, or other controlled substances, without the prescription of a physician;" (2)

“traffic in or associate with persons who use or traffic in narcotics or other controlled substances;” and (3) “possess, receive[, or] transport any firearm.” Defendant contends these conditions must be modified because they are unconstitutionally “overbroad and vague.”

II. Discussion

A. Applicable Law

The trial court has broad discretion to impose conditions of probation which encourage rehabilitation and protect the general public. (Pen. Code, § 1203.1; *People v. Fritchey* (1992) 2 Cal.App.4th 829, 836.)

In *People v. Lent* (1975) 15 Cal.3d 481, 486, the California Supreme Court stated the test for determining whether a particular condition of probation was invalid: “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Id.* at p. 486.) Thus, a condition will be invalidated only where all three criteria are satisfied.

A probation condition affecting a constitutional right is subject to higher scrutiny. “To the extent [a condition of probation] is overbroad it is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.” (*People v. Burden* (1988) 205 Cal.App.3d 1277, 1279.) “A statute that prohibits constitutionally protected conduct is overbroad and its enforcement may constitute a denial of due process. [Citation.] [¶] Under the overbreadth doctrine, ‘ “a

governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”’ [Citations.] ‘A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.’ [Citation.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.)

B. Waiver

Citing *People v. Welch* (1993) 5 Cal.4th 228, 237, and *People v. Gardineer* (2000) 79 Cal.App.4th 148, 151-152, the People contend defendant waived his constitutional objections to the challenged conditions of probation by not raising a timely objection in the trial court.

The question whether the waiver rule applies to constitutional challenges is pending in the California Supreme Court in the context of a juvenile probation condition. (*In re Sheena K.* (2003) 116 Cal.App.4th 438, rev. granted 6/9/04, S123980.) However, we need not decide whether a constitutional challenge to a probation condition must be raised in the trial court in order to be preserved for appeal since we find merit in defendant’s concomitant claim that his trial counsel provided ineffective assistance by failing to raise such an objection. Accordingly, we shall reach defendant’s overbreadth claim on its merits.

C. Ineffective Assistance of Counsel

“A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel’s failings.” (*People v. Price* (1991) 1 Cal.4th 324, 440.)

“[R]estriction of the right of association is part of the nature of the criminal process. Thus, freedom of association may be restricted if reasonably necessary to accomplish the essential needs of the state.” (*People v. Peck* (1996) 52 Cal.App.4th 351, 363, citations and quotation marks omitted.) However, the restriction must still be narrowly drawn to prevent any unnecessary infringement on constitutional rights. In *People v. Garcia* (1993) 19 Cal.App.4th 97, the Court of Appeal limited a probation condition which prohibited the defendant from associating with certain groups of persons (drug users and sellers and felons) because the condition did not require that the defendant have knowledge of the status of these persons. The court modified the condition to prohibit *knowing* association with those persons. (*Garcia* at pp. 102-103.) This modification was made because the condition was not “sufficiently narrowly drawn.” (*Garcia* at p. 102.) Similarly, in *People v. Lopez* (1998) 66 Cal.App.4th 615, the Court of Appeal, relying on *Garcia*, concluded that a condition which prohibited the defendant from “associating with persons not known to him to be gang members” was overbroad and modified the condition to prohibit association with known gang members. (*Lopez* at pp. 628-629.) For the same reason, the court modified a condition which would have prohibited the defendant from “displaying indicia not known to him to be gang related,” so that it applied only to those indicia that the defendant knew to be gang related. (*Lopez* at p. 629.)

We agree with *Garcia* and *Lopez* that, in the absence of a knowledge requirement, probation conditions of this type are not narrowly tailored. The associational prohibition with regard to people who use or traffic in narcotics requires that defendant be aware of the illegal behavior of the associate. Such probation conditions are necessary to tailor the conditions to serve defendant’s reformation and rehabilitation. If he does not know who and what to avoid, he will not be able to choose to comply with the conditions but will be in danger of unknowingly violating the conditions. This would not assist in his reformation. We therefore conclude that

trial counsel did render ineffective assistance by failing to object to the association prohibition.

By analogy, we conclude the remaining two challenged conditions of probation must be similarly modified to preserve them against defendant's overbreadth challenge. (See, e.g., *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 [transportation of controlled substance established by conveying usable quantity "with knowledge of both its presence and illegal character"]; *People v. Antista* (1954) 129 Cal.App.2d 47, 52-53 [defendant not guilty of illegal possession when lives with someone who unbeknownst to defendant stashed illicit drugs in their mutual residence].)

The People concede that "knowledge is required as an element of the challenged condition" but argue there is no need to modify the probation conditions to expressly so provide because the requirement "is implicit in the court's order."

In *Garcia*, *supra*, 19 Cal.App.4th 97, the court considered the precise issue before us, namely whether the knowledge requirement of a probation condition should be implied. The *Garcia* court stated that "the rule that probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights, lead us to the conclusion that this factor should not be left to implication." (*Id.* at pp. 102-103.) The court therefore modified a condition of probation prohibiting an adult probationer from associating with felons, ex-felons, and users and possessors of narcotics "to provide that appellant is not to associate with persons he knows to be users or sellers of narcotics, felons or ex-felons." (*Id.* at p. 102.) We find the reasoning in *Garcia* persuasive.

In light of *Garcia*, we believe an objection to the imposition of the three challenged probation conditions without a knowledge requirement was likely to be successful and that a reasonably competent trial counsel should have raised such an

objection. (*People v. Price, supra*, 1 Cal.4th 324, 440.) Accordingly, we shall modify the challenged probation conditions to include a knowledge requirement.

In light of our conclusion, we do not reach the question whether the challenged probation conditions were vague.

III. Disposition

The trial court's conditions are hereby modified in the following particulars:

(1) the words "Not to traffic in or associate with persons who use or traffic in narcotics or other controlled substances" shall be replaced with "You shall not knowingly traffic in controlled substances or knowingly associate with persons who use or traffic in narcotics or other controlled substances," (2) the words "You're not to use or possess alcohol, narcotics, drugs, or other controlled substances without the prescription of a physician," shall be replaced with "You are not to knowingly use or possess alcohol, narcotics, drugs, or other controlled substances without the prescription of a physician," (3) the words "Not possess, receive[, or] transport any firearm" shall be

modified to read “You shall not knowingly possess, receive, or transport any firearm.”² As so modified, the judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.

² We urge the Monterey County courts and probation department to act expeditiously to modify its standard preprinted probation conditions to comport with the modifications we order since a failure to do so will simply result in additional appeals such as this one.